United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-1248

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

against

JOSEPH GENTILE and ERNEST LAPONZINA,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of New York

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REPLY BRIEF FOR APPELLANTS

IRWIN KLEIN, P. C.,
Attorney for Defendants-Appellants,
2 Park Avenue,
New York, N. Y. 10016
(212) MU 3-0054

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH GENTILE and ERNEST La PONZINA,

Defendants-Appellants.

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IN REPLY TO RESPONDENT'S I

The three (3) statements of La Ponzina 's attorney (19a, 15a) were merely suggestions made to the assistant United States attorney and not to the Judge.

The judge declared and found as a fact that La Ponzina's attorney did not join in the motion (29a, 30a)

> "MR. KLEIN: .... I'm saying (29a) my participation, certainly is not a joinder in the motion.
> The COURT: I never said you joined in the motion. I said you participated in the discussion. If you read the opinion, I was very careful using the words (30).

There was no reversal in counsel's position. The only position that La Ponzina's counsel asserted to the Judge, was that he did not join in Gentile's motion and had no grounds to do so.

It was to La Ponzina's advantage to have Gentile's motion for a mistrial as to Gentile, granted, as borne out by the history of severance in this case (546a, 558a, 559a).

Originally, severance was granted pursuant to La Ponzina's motion. Subsequently, counsel consented to a joint trial for tactical reasons; viz- the third defendant, Lucadana intended to testify. At the eve of the trial Lucadana's attorney was ill and he was severed from the case, over the objections of the two appellants.

When Gentile moved to dismiss because of the improper opening by government counsel, La Ponzina's counsel suggested to government counsel, why Gentile was prejudiced thereby.

Even if such remarks had been made to the Judge, they were made as amicus curae, inasmuch as La Ponzina was certain to be affected by the declaration of a mistrial as to Gentile which would have afforded him the severance to which he felt entitled.

Hence there was no inconsistency or reversal of position, nor any waiver of La Ponzina's right to proceed to trial with the jury first selected.

On page 20 of its brief, the government concedes that if La Ponzina had moved for a mistrial, the motion should have been denied, provided he was the sole defendant. It is difficult to understand the converse thereof, as urged by the government, to wit; that merely because they were joint defendants, the motion should be granted as to both, even though one had no grounds therefor and did not join in the motion.

IN REPLY TO RESPONDENT'S II

As Judge Black reminded us in his dissenting opinion in Green v. United States, 356 U.S. 165 (1958) speaking of judges:

> "Like all the rest of mankind, they may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal."

We cannot close our eyes to the inevitable intrusion of judicial bias into the trial and sentencing process. There are numerous examples of such situations: contempt of court hearings, Taylor v. Hayes, supra, In re Murchison, supra and Tumey v. Ohio, supra; personal involvement, State v. Muraski, 69A 2d 745, Castelberry v. Jones, 99 P. 2d 174 (1940), Hoff v. Eighth Judicial District Court, 378 P 2d 977 (1963), Connelly v. United States District Court. 191 F 2d 692 (9th Cir. 1951), Offutt v. United States, 348 U.S. 11 (1954).

One of the most celebrated cases of judicial bias involved contempt proceedings of defense counsel by the trial judge. Denis (Sacher) v. United States, 343 U.S. 1. (1951) The Supreme Court found that the attorney's behavior offended the trial judge. The contents of the dissents of Justices Black, Frankfurter and Douglas all point out that Judge Medina could not sit in impartial judgment in the contempt proceedings because of his personal involvement in the trial. In the words of Mr. Justice Frankfurter:

> "The Judge acted as the prosecuting witness; he thought of himself as such. His self-concern pervades the record; it could not humanly have been excluded from his judgment of contempt. Judges are human, and it is not suggested that any other judge could have been impervious to the abuse had he been subjected to it."

To serve the purposes of equity and justice, it is essential to protect against bias in the best of us. Even if we were capable of elevating to

judgeship only the purest in heart, we still cannot achieve a purely objective trial or sentencing. We must understand that all judgments of human behavior are subjective and recognize that individualized and personal values intrude on the deliberations of any human being.

A judge is, even on the bench, a human being, and therefore subject to the same experiences and pressures as are we all. If the conditions of his life outside the court can introduce factors that will influence his decisions, so did his exposure in this Court during his disciplinary proceedings produce emotions which modified and impaired his judgment, and although buried from view are reflected in the denials of the motions to vacate and in the harsh sentences meted out. In Offutt v. United States, supra, the Supreme Court stated:

> "But judges also are human and may in a human way quite unwittingly identify offense to self with obstruction to law. Accordingly this court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charge is tangled with the judge's personal feeling against the lawyer. Plainly... there was an infusion of personal animosity."

In view of the government's opposition to the appellants' contention that the denial of the motions to vacate and the harsh and excessive sentences must have been subtly and subconsciously influenced by the judge's own pending disciplinary proceedings, perhaps it becomes incumbent upon defense counsel, to inquire and ascertain whether, in fact, the status of this case was

sought by the tribunal who conducted the disciplinary proceedings of the judge.

IN REPLY TO RESPONDENT'S III

The agent admitted that he did not advise La Ponzina at all (219a) and that he did not advise Gentile that he could have his counsel present (161a, 162a).

The admission of any testimony was plain error in view of the flaunting of the regulation by the special agent, and is violation of appellants' constitutional rights under the Fifth Amendment.

Moreover, the failure of the Judge to give adequate instructions in his charge to the jury as to the effect of the piercing of the appellants' rights to remain silent and have their attorneys present, was error.

Request No. A-2 set forth on page 35 of appellants main brief should have been charged, rather than the terse instruction (App. 518a)

> "You must treat this information like any other piece of evidence, that is, you must determine the weight to be given this testimony."

Counsel submits, this is woefully inadequate and hence prejudicial.

IN REPLY TO RESPONDENT'S IV

The " jam on the face " remark was justified in that it referred solely to (a) Tsotso's false testimony that he had testified before the grand jury about La Ponzina's "whisper" and (b) Mr. Barlow's conduct in asking Tsotsos the leading and suggestive question, whether he had, in fact, so testified about the "whisper" before the grand jury, even though Mr. Barlow had presented the case to the grand jury and knew that Tsotsos had not used the word "whisper", and after extracting an affirmative answer to such question from Tsotsos, sitting by and failing to notify the Judge or jury that

his witness, in response to his suggestion, had given an untrue answer (350a). Never was the truth so lacerated. Fortunately, defense counsel presented the witness with the transcript of his grand jury testimony at which point the witness admitted that his answer was false and that he did not use the word "whisper" before the grand Jury (359a-363a).

The prosecutor's question should not have been asked. It was tantamount to a suggestion that the witness give a false answer to the "whisper" question.

This was not an attack upon government officials or the government-merely against the witness and prosecutor.

The attempt to weight the government's case by mentioning other government agents and assistant United States attorney was unjustified and prejudicial, inasmuch as none of the others were involved.

IN REPLY TO RESPONDENTS'S V

Apparently, respondent has misunderstood the thrust of appellants' point V.

Appellants contend that the note from the jury requested the single tape which contained (a) testimony about the $1,000.00-alleged bribe and (b) free golf lessons.

The only such tape was that of August 8th.

Appellants' objected to the playing of the tape of August 3rd, which the jurors did not ask for.

Appellants' brief does not refer to the tape of August 9th.

Appellants' contend that the playing of the unrequested August 3rd tape immediately prior to the requested August 8th tape was prejudicial to the appellants.

IN REPLY TO RESPONDENT'S VI

Participation is separate and distinct from mere knowledge. Participation requires more than an acknowledgement of awareness.

At most, La Ponzina's statements merely evince knowledge.

He did nothing in participation. He did no act in furtherance. He merely benefited (sic). He was not a necessary party to the offense which was complete without him on the August 8th meeting.

IN REPLY TO OTHER RESPONDENTS'S POINTS

No reply is submitted to other points contained in respondent's brief, inasmuch as we feel that such matters are adequately covered in appellants' main brief.

Respectfully Submitted,

IRWIN KLEIN, P. C.
Attorney for Defendants-Appellants

September 8, 1975

IRWIN KLEIN
(of counsel)

376—Affidavit of Service by Mail The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNITED STATES COURT OF APPEALS :::: FOR THE SECOND CIRCUIT

USA

VS

GENTILE & LA PONZINA

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York, ss.:

HAROLD DUASH, agent for Irwin Klein, defendants-appellants for the above named, being duly sworn deposes and says that he is the attorney herein. That he is over 21 years of age, is not a party to the action and resides at 2346 Holland avenue BX, N.Y.

That on the 9th day of Septemebr, 1975, 19 , he served the within reply brief for appellants

UPON: KIRBY W. PATTERSON,
Room 2318, United States Dept, of Justice, Washington, D,C. 20530

upon the attorneys for the parties and at the addresses as specified below

by depositing three copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 9th day of September, 1975, 19.....

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Harold Duash